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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

No. 598

LEROY SEXTON,
Petitioner,

vs.

JACKSON READY-MIX CONCRETE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF OF RESPONDENT IN OPPOSITION

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Respondent's position is (1) there is no certiorari jurisdiction for the reason that no federal question was raised in or passed upon by the Supreme Court of Mississippi, and (2) no question arising under the Constitution

of the United States or under federal law was involved in the case before and decision of the Supreme Court of Mississippi.

JURISDICTION

Petitioner seeks to invoke jurisdiction under Title 28, *U.S.C.*, § 1257(3), which provides for review of the decision of State Courts by writ of certiorari "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." In the State Court proceedings there was no title, right, privilege or immunity "specially set up or claimed under the Constitution," of the United States.

Petitioner cites no specification of error either on the original submission to the State Court or in his petition for rehearing which either specially or generally makes any claim to or violation of the Constitution of the United States or any statute or treaty of the United States.

It has been repeatedly held that this Court will not assume certiorari jurisdiction where petitioner has failed to specially claim in the State Court a right given by the federal Constitution or laws, as to which see, for example, *Grand Gulf R.R. & Banking Co.* v. *Marshall* (1851), 53 U. S. 165, 12 How. 165; *Hagar* v. *People of the State of California* (1878), 14 S.Ct. 1186, 154 U.S. 639; *Connecticut ex rel. New York & N.E.R. Co.* v. *Woodruff* (1894), 14 S.Ct. 976, 153 U.S. 689; *Rogers* v. *Clark Iron Co.* (1910), 30 S.Ct. 693, 217 U.S. 589; *Edelman* v. *People of State of California* (1952), 73 S.Ct. 293, 344 U.S. 357; *Slagle* v. *State of Ohio* (1961), 81 S.Ct. 1076, 366 U.S. 259. See also *32 Am.Jur.2d*, Federal Practice & Procedure, § 297.

STATEMENT OF THE CASE

Leroy Sexton sued Jackson Ready-Mix Concrete and others in the Circuit Court of Hinds County, Mississippi for personal injuries. At the conclusion of the trial the motion of Jackson Ready-Mix Concrete for a directed verdict was denied, and from a jury verdict and judgment in favor of Sexton an appeal was taken to the Supreme Court of Mississippi, with Ready-Mix alleging error on the part of the trial court in failing to direct a verdict in its favor. Finding that Ready-Mix was entitled to a directed verdict under the evidence and applicable law, the Supreme Court reversed and rendered judgment of dismissal.

Sexton, a licensed electrician, was an independent electrical contractor doing business as Leroy Sexton Electric Service. His experience in this specialized field had extended over a period of 30 years at the time of his injury; and he held himself out to the public as a skilled and experienced electrician.

Ready-Mix was engaged in a concrete manufacturing enterprise in which the use of electricity was incidental. It had no skilled or experienced electricians in its employ, and had contracted with Sexton from time to time to supply labor and materials for electrical jobs which required the services of an electrician with specialized skill and experience in the field. The expert services performed by Sexton included numerous safety inspections of the electric installations at the Ready-Mix plant.

On the occasion of Sexton's injury, he was in the process of installing an additional line on an existing pole located on the premises of Ready-Mix. Sexton admitted that he knew that the wires on this pole carried a current of electricity and that the current had not been disconnected

and admitted that he had worked on this particular pole on other occasions.

Sexton worked in daylight and was in full possession of his faculties. No employee of Ready-Mix was present at the time of the accident and no effort was made by Ready-Mix to exercise any control or direction over the means and methods by which Sexton was to perform his work.

Despite Sexton's qualifications and experience as a licensed electrician and his complete knowledge and awareness of the circumstances under which his work was being performed, he nevertheless carelessly allowed his body to come in contact with one of the charged wires, causing him to fall from the pole on which his work was being performed, resulting in severe personal injuries.

The above statement is an abbreviation of the facts set forth in the opinion of the Supreme Court of Mississippi attached to the certiorari petition as Appendix C, pages 17-26.

The Supreme Court of Mississippi reviewed the record of the testimony offered and the evidence presented and on the basis of the local law relating specifically to the subject matter, held that Sexton was guilty of negligence which was the sole proximate cause of the accident, and that as to the condition of the premises on which he was working, and especially the condition of the pole and electrical attachments, assumed the risk. The State Court reviewed the applicable authorities and made its decision on the basis of local tort law and rendered the judgment which, in its opinion, should have been rendered by the trial court.

SUMMARY OF ARGUMENT

Aside from the jurisdictional impediment, discussed above, there is no merit in the petition. The Supreme Court of Mississippi reached its decision on the basis of the peculiar facts and circumstances involved in the case and applied its concept of the appropriate legal principles applicable to the adjudication of tort claims in the State of Mississippi. In so acting, the State Court applied local law and did not transcend federal constitutional bounds and did not violate a federal statute or law.

ARGUMENT

The Supreme Court of Mississippi is created and functions pursuant to *Mississippi Constitution of 1890.*[1]

As hereinabove noted, Ready-Mix made an appropriate motion in the trial court for a judgment of dismissal on a directed verdict, which in Mississippi is sometimes called a peremptory instruction. The rule in this State is that such motions or instructions may be granted and the case withdrawn from consideration of the jury in a common law action when the defendant is entitled to be dismissed on the facts presented as a matter of law. *Mississippi Code of 1942,* § 1962, provides that the Supreme Court, in case of a reversal of the judgment of a lower court, may render such judgment as the court be-

1. Mississippi Constitution:

"Section 144. The judicial power of the state shall be vested in a Supreme Court and such other courts as are provided for in this constitution."

"Section 146. The Supreme Court shall have such jurisdiction as properly belongs to a court of appeals."

low should have rendered. The full text of the statute is set forth in the footnote.[2]

It has been repeatedly held in this jurisdiction that where a defendant is found to be entitled to a directed verdict or peremptory instruction the Supreme Court, on reversing the judgment for the plaintiff, will render judgment for the defendant, and that such reversal and rendition follows as a matter of course whenever the defendant is entitled to be dismissed on the evidence as a matter of law, as to which see *Yazoo and M. Valley R. Co. v. Pope* (1913), 104 Miss. 339, 61 So. 450; *Hines v. Cole* (1920), 123 Miss. 254, 85 So. 199; *Hattiesburg Chero Cola Bottling Co. v. Price* (1926), 143 Miss. 14, 108 So. 291.

There has been no discrimination in Sexton's case and no denial of the equal protection of the laws or violation of any other constitutional mandate. Instead, Sexton's case was decided by the Supreme Court of Mississippi upon its own peculiar facts and circumstances by the application of local tort law as the Supreme Court of the State of Mississippi saw the facts developed and the law applicable thereto.

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2. "§ 1962. *Cases heard at return term; judgment.*

"The Supreme Court shall hear and determine all cases properly brought before it at the return term, unless cause be shown for a continuance; and in case the judgment, sentence, or decree of the court below be reversed, the Supreme Court shall render such judgment, sentence, or decree as the court below should have rendered, unless it be necessary, in consequence of its decision, that some matter of fact be ascertained, of damages be assessed by a jury, or where the matter to be determined is uncertain; in either of which cases the suit, action or prosecution shall be remanded for a final decision; and when so remanded, shall be proceeded with in the court below according to the direction of the Supreme Court, or according to law, in the absence of such directions."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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